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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

MRS. OSCAR C. DOTY, ET AL.----------Appellants

VS. NO. 585

J. S. LOVE, SUPERINTENDENT OF BANKS,
ET AL, ----------Appellees

STATEMENT OF THE CASE, BRIEF AND ARGUMENT IN BEHALF OF APPELLANTS AND ANSWER TO MOTION TO DISMISS

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STATEMENT OF THE CASE

The above cause is before this court by virtue of an appeal from a judgment of the Supreme Court of the State of Mississippi, affirming a decree rendered in said cause by the Chancery Court of Lee County, Mississippi. The decision of the Supreme Court of the State of Mississippi in said cause is found reported in the case of **Dunn, et al, v. Love, et al, 155 So., 331,** to which reference is here made.

The appeal, as shown by the record, is taken under the provisions of **United States Code, Title 28, Section 344, Judicial Code, Section 237,** and amendments, the constitutional issues involved being raised and maintained at all stages in the court below, namely, that the statute in question, as construed by the Supreme Court of the State of Mississippi, and the judgment of said court impairs the

obligations of certain contracts; denies to appellants the equal protection of the laws, and deprives them of their property without due process of law in violation of **P. 1, Sec. 10, of the Constitution of the United States and P. 1 of the Fourteenth Amendment to the Constitution of the United States**; and the protection of said provisions of the United States Constitution was specifically invoked. (Rec. 129-132, 167-171).

The facts in the case are substantially as follows:

On December 24, 1930, the Peoples Bank and Trust Company of Tupelo, Mississippi became insolvent and was placed under the charge of the State Banking Department for liquidation, as provided by **Chapter 85 of the Code of 1930 of the State of Mississippi (See Appendix a, Original Brief)**, and remained in process of liquidation until the 15th day of May, 1933, when a petition to reopen the bank in question was filed in the Chancery Court of Lee County, Mississippi, under **Chapter 251 of the Laws of the State of Mississippi, 1932. (See Appendix b Original Brief)**,

The record shows that when the bank in question closed for liquidation on December 24, 1930, its assets and liabilities were $2,477,114.78, with a capital stock of $200,000.00, and a surplus of $75,000.00. (Exhibit I to Petition, Rec. 14).

The record shows that on May 1, 1933, the bank in question had assets of the stated value of $1,901,672.92 with a deposit liability in excess of $5.00, of $1,311,303.43, and a deposit liability under $5.00 of $3,649.87. (Exhibit III to

Petition, Rec. 17-18).

On the 18th day of May, 1932, the Legislature of the State of Mississippi enacted and passed **Chapter 251 of the Laws of the State of Mississippi, 1932**, which said statute has as its purpose the reopening of banks theretofore closed by reason of insolvency.

On the 15th day of May, 1933, J. S. Love, Superintendent of the State Banking Department, and certain members of a depositors' committee, acting under the authority of **Chapter 251 of the Laws of the State of Mississippi, 1932**, filed a petition in the Chancery Court of Lee County, Mississippi, requesting the court to enter a decree reopening the bank in question, and approve the plan submitted upon which the reopening of the bank in question was to be based. (Rec. 1-13).

The petition filed discloses an effort to comply with the formal requirements of **Chapter 251 of the Laws of the State of Mississippi, 1932**, in that, it states that (a) more than three-fourths of the general depositors and creditors of the Peoples Bank and Trust Company, or general depositors owning three-fourths of the claims against the said Peoples Bank and Trust Company, have signed what is commonly termed a "freezing of deposits agreement" (Rec. 15) under which said agreement the depositors signing agreed to accept repayment of their deposits and claims, over a period of years, the full amount thereof, or in reduced amounts, with or without interest, the period over which the deposits and claims are to be repaid and the rate of

payment, together with the interest rate, if any, to be determined by the Superintendent of Banks; that (b) the Superintendent of Banks is convinced that the bank is in a solvent condition and can repay the depositors in accordance with the terms of the agreement and the repayment of same; that (c) incorporated in said petition is the plan upon which the bank is to be reopened; and, finally, (d) attached to the petition is a statement of the assets and liabilities of the bank as of the date of reopening, as is required by **Chapter 251 of the Laws of the State of Mississippi, 1932, (Rec. 1-21).**

Upon the filing of the petition in question, and in accordance with a part of the prayer thereof, the Chancellor, in vacation, to wit, the 4th day of May, 1933, entered an order setting the cause for hearing in vacation on the 15th day of May, 1933, and ordered the clerk of the Chancery Court to issue process for all parties interested by publishing a general notice of said hearing in a weekly newspaper published in Lee County, Mississippi, commanding all the depositors, creditors, and other parties in interest to appear before the Chancellor in vacation at a designated place and time, to show cause, if any they could, why the prayer of the petition in said matter should not be granted, and further ordered the clerk of the Chancery Court to issue personal process on fifteen of the general depositors of said bank, to appear and answer the petition on the day and date designated, which said fifteen depositors were to be considered as a class, such service of process to bind all the depositors and creditors of said bank. Personal service

seems to have been obtained on three of the depositors, as shown by the record, the record further showing that some were non-resident corporations of the State of Mississippi (Rec. 22-24).

The appellants in this cause appeared on the day and date designated to answer the petition in question and filed elaborate objections to the granting of the prayer of said petition. In the objections filed, appellants challenged the validity of the entire proceedings, including the validity of **Chapter 251 of the Laws of the State of Mississippi of 1932**; the validity of the plan submitted upon which to base the reopening of the bank in question; the validity of the process issued and the validity of the procedure adopted as being obnoxious and repugnant to and in violation of certain of the provisions of the Constitution of the United States; in that, **Chapter 251 of the Laws of the State of Mississippi**, 1932; the plan submitted under which said bank was to be reopened; and, the entire procedure adopted and followed, impaired obligations of contracts theretofore existing between appellants and the defunct bank in question, in violation of **Section 10, P. 1 of the Constitution of the United States**; deprived appellants of their property without due process of law; and denied to appellants the equal protection of the laws, in violation of **P. 1 of the 14th Amendment to the Constitution of the United States** (Rec. 25-33, 35-44).

When the hearing of the cause, upon the petition filed by appellees, and the objections filed by appellants, was concluded, the Chancellor in the court below overruled the

objections of appellants and entered a decree authorizing the bank in question to reopen as a new bank, upon the plan or scheme as set forth in the decree (Rec. 44-64).

The decree entered in the cause is in substance as follows:

The bank in question, upon opening, was to charge itself with twenty-five per cent of the amount of deposits and claims due depositors and general creditors of the insolvent bank, as of the date of re-opening, to-wit, May 15, 1933, with the exception of those deposits and claims under $5.00. As to the balance of the seventy-five per cent of the deposits and claims due depositors and general creditors, such was to be charged out of the bank and the bank was to be released of any further liability for the payment of same, same to be charged only against what is denominated as "pool assets." (Rec. 44-64).

Upon the opening of the bank in question, said bank was to pay five per cent of the amount of the original deposits in the insolvent bank to the depositors thereof, the balance of the twenty per cent of same to be paid in succeeding installments of five per cent whenever collections from the assets carried into the new bank shall equal five per cent of the then outstanding claims and deposits against the new bank (Rec. 44-64), and as to all deposits and claims under five dollars, the new bank, upon opening, was to pay same in full (Rec. 44-64).

That assets of the insolvent bank of the value of $491,-708.45, of which amount $19,186.44 is represented by secur-

ed notes given on account of capital structure of the new bank, are to be set over to the new bank and carried on its books at a valuation of $216,892.08. The new bank is to collect out of said assets the sum of $216,892.08, and when such sum has been collected, the remainder of the assets are to be transferred to the pool, to be there held to pay the seventy-five per cent of the deposits and claims charged out of the bank. (Rec. 44-64).

That bonds carried at a value of $81,610.15 in the insolvent bank are to be set over into the reopened bank, after giving effect to capital structure, at a value of $50,000.00, out of which the new bank is to collect $50,000.00, and the balance remaining, after the collection of said $50,000.00, is to be transferred to the "pool assets." That overdrafts of the insolvent bank, in the amount of $4,101.94 are also to be set over to the new bank. That stocks and bonds of the insolvent bank of the value of $37,468.60, are to be set over the new bank, from which the sum of $7,500.00 is to be collected by the new bank, and the balance transferred to the "pool assets." That all furniture and fixtures of the insolvent Peoples Bank and Trust Company at Tupelo, Rienzi, and Nettleton, Mississippi, of the value of $20,000.00, shall be set over unto the new bank at a valuation of $5,000.00, the "pool assets" to receive all amounts over and above the sum of $5,000.00 that may be realized therefrom.

That real estate of the value of $375,723.86, after giving effect to capital structure, is to be set over unto the new bank at a valuation of $68,917.50. That the three bank

buildings owned by the bank in liquidation, of the value of $55,000.00, are to be set over unto the new bank at a valuation of $12,500.00, and all sums realized from same, over and above $12,500.00, are to be transferred to the "pool assets." That assets of the value of $1,065,613.00, belonging to the bank in liquidation, or the depositors and general creditors of same, are to be set over unto the new bank at a valuation of $394,880.12, out of which the new bank is to collect the sum of $295,994.02, which it shall retain for its own use (Rec. 44-64). That there is to be set over unto the new bank, all cash on hand belonging to the bank in liquidation as of date of May 1, 1933, to-wit: the sum of $102,302.98 (Rec. 44-64).

That the new bank is to receive all interest collected on the notes and bonds set over unto it until the full principal sum for which said notes and bonds were set over unto the new bank shall have been collected; all dividends and earnings from stocks and bonds until the new bank shall have realized the sum of $7,500.00 from the sale of same; and all rents, issues and earnings from all real estate set over unto the new bank, until the new bank shall have realized the sum of $68,917.50 from the sale of all, or any portion of said real estate, the new bank in return therefor to pay all taxes, insurance, and upkeep on same, all expenses expended in the preservation and upkeep of said property occasioned by acts beyond the control of the reopened bank shall be chargeable against the assets of the pool. (Rec. 44-64).

That in return for the setting over unto the new bank

in question the assets heretofore mentioned and other benefits, the new bank assumes a liability to the depositors and general creditors to the extent of tweny-five per cent of the principal amount due them by the bank in liquidation, to be paid at the rate of five per cent upon opening and the balance of twenty per cent in deferred installments, if and when collected as heretofore set forth in this statement. (Rec. 44-64).

That the new bank is to be released from the payment of, or any liability to pay, the seventy-five per cent balance due the depositors and general creditors on their claims, but such balance is to be paid from the "pool assets" to be collected and held in trust by the new bank and administered under the jurisdiction of the Chancery Court of Lee County, Mississippi, with J. S. Love in charge of same as "the agent of the court" there being no definite time stated as to when the collections from the "pool assets" shall be paid to the depositors and general creditors.

That the new bank is to receive as compensation for collecting and handling the "pool assets" in question, ten per cent of all amounts collected on same, except such sums as are collected by the sale of any of the real estate, stocks or bonds belonging to the pool. That the new bank is to be reimbursed for all attorney's fees and court costs expended in collecting the assets of the pool, and preserving same, and all expenses incurred in the protection and preservation of said assets. (Rec. 44-64).

That the new bank shall open with a capital stock of

not less than $35,000.00, fully paid in cash, and that all the stockholders of the former insolvent Peoples Bank and Trust Company, who shall pay into the new bank fifty per cent of their stock liability incurred by reason of the closing of the Peoples Bank and Trust Company shall be released of fifty per cent of their stock liability and from any further liability to the depositors and general creditors, as such stockholders of said insolvent banking institution, and that the sum of $10,000.00 theretofore paid to the bank in liquidation in excess of fifty per cent of the stock liability of the stockholders therein should be refunded such stockholders and that all judgments theretofore entered against said stockholders of said insolvent Peoples Bank and Trust Company by reason of their stock liability, should be cancelled, and that the original stock held and owned by the stockholders in the insolvent banking institution should be released to such stockholders and any and all securities as may have been taken from such stockholders to secure the payment of the statutory liability incurred by virtue of being stockholders in the insolvent banking institution should be delivered to such stockholders; and that all stock of said insolvent banking institution should be cancelled. (Rec. 44-64).

That additional assets should be set over unto the new bank to provide a surplus to the extent of $35,000.00 and reserve to the extent of $10,000.00, same to be repaid into the "pool" out of the earnings of the reopened bank, all earnings, after the payment of expenses to the amount of $7,500.00 per year, to be paid into the pool for the repay-

ment of said amounts so provided, without interest. (Rec. 44-64).

That upon complying with the provisions of the decree, the said Superintendent of Banks and the liquidating agent of the Peoples Bank and Trust Company, are discharged fully and finally in the liquidation of said defunct bank and each of them and their bondsmen are released from any and all liability on account thereof. (Rec. 44-64).

It is further adjudicated in the decree that the charter of incorporation of the Peoples Bank and Trust Company has been amended reducing the capital stock from $200,000.00 to $55,000.00; that the interest of all old stockholders of the Peoples Bank and Trust Company at the time it closed for liquidation has been consumed; that all stockholders in the Peoples Bank and Trust Company in liquidation have been called on for their statutory double liability as provided by law; that the old certificates of stock should be cancelled and surrendered to the proper officers of the corporation; that new certificates be issued to the stockholders in the new or reopened bank; and, that all old stockholders who have not provided the assets for new capital stock, shall have no interests in the assets of the new corporation.

It is further provided in the decree "that all expenses incurred in the liquidation of the Peoples Bank and Trust Company and in the reopening of said bank up to the date of reopening, shall be paid out of the assets taken into the pool, which expenses shall include the cost incurred in this

cause, and in any other legal proceedings had in the liquidation, and which expenses are to be a charge against the assets taken into the pool, and should the reopened bank pay any such expenses, it is authorized to be reimbursed therefor from the pool." (Rec. 44-64).

An appeal to the Supreme Court of the State of Mississippi from said decree was granted appellants in said cause.

Appellants perfected their appeal to the Supreme Court of the State of Mississippi in the method as required by law, and filed joint and separate assignments of error, the assignments of error setting forth that the decree of the court below, the plan set forth therein for the reorganization of the bank in question, the procedure followed, and the construction placed upon **Chapter 251 of the Laws of the State of Mississippi, 1932,** by the court violates **P. 1 of Section 10 of the Constitution of the United States and Section 1 of the 14th Amendment to the Constitution of the United States.** (Rec. 101-106).

On June 5, 1934, the Supreme Court of the State of Mississippi entered a judgment affirming the decree of the Chancery Court of Lee County, Mississippi, entered in said cause (Rec. 107), and said opinion clearly demonstrates the fact that all the constitutional questions and issues were passed upon by said court adversely to the claims of these appellants as to their rights under said provisions of the Constitution of the United States (See Record: Opinion of Supreme Court of State of Mississippi in Case of **Dunn vs. Love 155 So. 331**), said judgment being a final judgment of the highest court of the State of Mississippi and being the

court of last resort. (Rec. 108-129).

Appellants, in due time, and in the manner as directed by law, filed a suggestion of error permitted under the procedure of the State of Mississippi, and this suggestion of error, necessary to make the judgment of said court final, was overruled by the Supreme Court of the State of Mississippi at the September Term, 1934, of said court.

Appellants then, as required by the rules of this court, prayed for and obtained an appeal to the Supreme Court of the United States, and the Chief Justice of the Supreme Court of the State of Mississippi entered the proper order granting the appeal and bond having been filed and approved, as required, the proper citation for appellees to appear in this Court was issued. (Rec. 129-132).

The record shows that the procedure for obtaining said appeal was in compliance with the rules of this Court and of the statutes made governing such appeals.

The printed transcript of Record was received by the Clerk of Supreme Court of the United States from appellants on the 23rd day of February, 1935, and shows to have been filed December 19, 1934. On the 25th day of February, 1935, appellants were served with copy of motion to dismiss the appeal, which motion sets out that the Record was not filed with the Clerk of the Supreme Court of the United States within forty days of the granting of the appeal by the Chief Justice of the Supreme Court of Mississippi. In reply to that motion appellants file herewith copy of affidavit of the Clerk of the Supreme Court of

Mississippi showing that the transcript of Record was forwarded by him by air mail to the Clerk of the Supreme Court of the United States on the 12th day of December, 1934, and copy of a registry receipt showing that said transcript was received by the Clerk of the Supreme Court of the United States on the 13th day of December, 1934. And there is also attached to said affidavit copy of letter from the Clerk of the Supreme Court of the United States dated December 13, 1934, acknowledging receipt of transcript of Record in this cause, which affidavit together with exhibits thereto conclusively shows that said Record was filed with the Clerk of this Court within the forty days in strict accordance with **Rule 10** of this Court.

Said motion to dismiss also alleges non-compliance with **Rule 27** of this Court, which requires the filing of briefs by appellants at least three weeks before the case is called for hearing, but appellees overlook the fact that a brief was filed by appellants on or about the 16th day of December, 1934, as shown by brief on file in this cause: and inasmuch as the printed transcript of the Record was not received by appellants until the 21st day of February it is manifest that **Rule 27** of this Court could not have been complied with if appellants were required to file a brief in addition to the one filed on or about the 16th day of December, 1934. (See Exhibits A-B-C. Pg. 31).

BRIEF AND ARGUMENT

Appellants file this brief as a supplement to the original brief heretofore filed in this cause and refer the Court to said original brief which is asked to be taken and considered in connection with this brief.

Inasmuch as this Court under its rules will only consider the points heretofore presented in the statement filed by appellants setting forth the points upon which they would rely, we shall confine this brief and argument to same. The points upon which appellants have heretofore stated they will rely are dual and are as follows:

Appellants contend first that **Chapter 251 of the Laws of the State of Mississippi, 1932,** (Appendix c, original brief) as construed by the Supreme Court of the State of Mississippi in said cause is repugnant to, and in violation of, **Paragraph 1 of Section 10 of the Constitution of the United States;** in that, the construction placed upon said **Chapter 251 of the Laws of the State of Mississippi, 1932,** the decree rendered in said cause by the Chancery Court of Lee County, Mississippi, and the judgment of the Supreme Court of the State of Mississippi affirming said decree impair the obligations of the contracts theretofore existing between appellants and the insolvent bank in question; and, second, that **Chapter 251 of the Laws of the State of Mississippi, 1932,** the decree rendered in said cause by the Chancery Court of Lee County, Mississippi, and the judgment of the Supreme Court of the State of Mississippi affirming said decree deprive these appellants of their

property without due process of law and denies these appellants the equal protection of the laws in violation of **Paragraph 1 of the 14th Amendment to the Constitution of the United States.**

We shall present this brief and argument with the above outline in view and we shall necessarily present first the question of the impairment of the obligation of the contracts.

The record discloses that long prior to the closing of the bank in question by reason of insolvency, the appellants made their deposits therein, thereby bringing into existence the contracts in question and giving rise to the relation of debtor and creditor between themselves and the defunct bank in question. Appellants submit that they had vested rights under these contracts which could not be destroyed. Appellants contend that the statute in question, the decree of the Chancery Court of Lee County, Mississippi, and the judgment of the Supreme Court of the State of Mississippi affirming said decree not only impaired the obligations of the contracts in question but absolutely destroyed same. The record shows that the bank in question had a capital stock of $200,000.00 and other assets consisting of money, securities and property and appellants submit that they had a right to look to these assets for the payment of their claims and when the procedure in question released the stockholders of any or all liability to the creditors of said corporation this amounted to impairing the obligation of these contracts in violation of **Paragraph 1 of Section 10 of the Federal Constitution.**

It is well settled that the relation of stockholders to the creditors of a corporation is contractual and that such contracts cannot be destroyed, their value lessened or modified by legislation and that such contracts come under the protection of the Federal Constitution.

Michie Banks & Banking V 1 p 163
7 R C L No. 277 Banks & Banking
14 Corpus Juris 507
Williams vs. Cobb 242 U S 307.

It is, therefore, the contention of appellants that when the stockholders were relieved of their liability to the appellants by the decree in question, appellants being creditors of the corporation, the provision of the Federal Constitution prohibiting impairment of contract obligations was violated.

Appellants further contend that they had a right to enforce their claims against the insolvent corporation in the manner provided by the laws in existence at the time of the making of the contracts in question. It will be remembered that at the time the contracts in question were entered into the laws of the State of Mississippi provided a full and complete scheme for the liquidation of insolvent banks and such laws regarding such liquidation provided a method for payment of the claims of an insolvent bank. Appellants contend they had a vested right in the remedies then provided and that such remedies could not be destroyed without impairing the obligations of

the contracts existing between appellants and the bank in question.

It is well settled that all laws which exist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it. This embraces those laws which affect its validity, construction, discharge and enforcement.

Walker vs. Whitehead 16 Wallace 314.

It is further well settled that the obligation of a contract is the law that binds the parties to perform same.

Sturgis vs. Crowninshield 4 Wheatley 197

It is further well settled that any law which releases any part of the obligation of a contract, abridges same, or dispenses with expressed conditions therein impairs the obligation of same.

Green vs. Biddle 8 Wheatley 84

It is further well settled that the amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provisions and the judicial power of the Court to redress the wrong.

Farrington vs. Tennessee 95 U S 683.

It is further well settled by the authorities that the remedies provided for the enforcement of contracts in existence at the time of the execution of same enter into and form a part of its obligation and any law of the state,

or judicial action that lessens, or materially alters same, impairs the obligation of the contract and is void.

McCracken vs. Hayward 2 U S 1
Bronson vs. Kinzie 1 Howard 311

It is further well settled that impairment of the obligation of a contract by judicial decision falls within the constitutional prohibition.

Swift vs. McPherson 232 U S 51

Ohio Life Insurance Company vs. Deboldt 16 How 432.

It is the contention of appellants, therefore, that when these stockholders were released of their liability to the creditors of the banking corporation and when all rights of these appellants to protect their claims were destroyed and all remedies for the enforcement of same were taken away, such constitutes an impairment of the obligation of the contracts in violation of **P. 1 Sec. 10 of the Constitution of the United States** and for such reason appellants respectfully submit that the case should be reversed and the petition dismissed.

Appellants next contend that they were deprived of their property without due process of law in violation of the **14th Amendment to the Federal Constitution.**

The record discloses that the process issued in this case was issued under order of the Chancellor, commanding all interested persons to appear in vacation on a day certain to show cause, if any, they could, why the prayer of the petition filed in the case should not be granted. A general notice of such hearing was ordered published in a weekly

newspaper published in Lee County, and personal summons was ordered to be issued upon fifteen interested creditors of the insolvent bank in question, who should be considered as a class.

There is no statute of Mississippi authorizing a Chancellor to formulate an independent scheme of notice, or process. **Chapter 58 of the Code of the State of Mississippi, 1930**, is the process statute, and provides for summons and publication in various cases. **Section 2965 of the Code** provides that a summons shall not issue in any case, at law or in chancery, until the declaration, bill, petition, or other pleading beginning the cause, shall be filed. The process to bring in defendants at law and in chancery, shall be a summons and it shall command the officer to summon the defendant to appear and answer on the return day. **Section 2969** provides for summons in cases in chancery to be made returnable on a rule day in vacation, sufficiently distant in time to admit of due service thereof, or on the first day of the next regular term, etc. **Section 2972** provides for a summons by publication in a proceeding in the Chancery Court, where it is shown by affidavit filed, that a defendant is a non-resident of the state, or not to be found therein, and in such case the clerk shall promptly prepare and publish a summons to such party to appear and defend the suit on a rule day in vacation, or on the first day of the next regular term, if thereby the answer of the defendant would be the earlier required. **Section 2973 of the Code of the State of Missis-**

sippi of 1930, provides how unknown and non-resident defendants may be brought into Court. **Section 143 of the Laws of the State of Mississippi, 1932,** relates to the setting of causes in chancery for hearing in vacation, and the summons required to be issued to give notice to interested parties of such hearing.

A careful reading of the whole statute on process will show that the publication here made was not authorized by any statute of the State of Mississippi. It is necessary for a statute to prescribe how such process shall issue and this must be found in the law itself. **Chapter 251 of the Laws of the State of Mississippi, 1932,** does not provide anywhere for the giving of notice to the depositors and creditors; for the issuance of summons; or for the issuance of any process. Therefore, it is clear that there was no statute of the State of Mississippi in force and effect authorizing the scheme of process as formulated by the Chancellor in this cause. A Chancellor cannot take the place of the Legislature; such authority cannot be delegated and there has been no attempt to delegate it in the manner in which it is attempted to be exercised in this case.

Pennoyer v. Neff, 95 U. S. 714.

It is well settled by the authorities that due process of law means that a citizen must be accorded a hearing in a legal manner, according to the principles of jurisprudence in force and effect relating to the hearing, which includes a procedure conforming to the maxims of the law regarding same.

Due process of law requires that an interested party must be notified of the hearing by a method of process found in some statute authorizing same, and any proceeding based upon process unauthorized by any law, wherein a citizen is deprived of his property, results in such citizen being deprived of his property without due process of law as guaranteed to him under **P. 1 of the 14th Amendment to the Constitution of the United States.**

Inasmuch as the record clearly discloses the fact that these appellants, depositors in the defunct bank in question, were deprived of their property, both real and personal, in the amount of several hundred thousand dollars, including stockholders liability, judgments, and the right to pursue same in satisfaction of their claims, and inasmuch as the record discloses that the notice given to these appellants of the hearing of this cause was upon process unauthorized by any statute existing in the State of Mississippi, we respectfully submit that such statute, as it provides for no notice whatever, violates **P. 1 of the 14th Amendment to the Constitution of the United States,** and as the Chancellor had no authority to formulate the scheme of process issued in question, all proceedings had thereunder are void and of no effect, and inasmuch as certain valuable property rights were destroyed and a considerable amount of property was taken from these appellants under the decree and judgment of the courts below, such is tantamount to depriving these appellants of their property without due process of law in violation of **P. 1 of the 14th Amendment to the Constitution of the United States.**

J. J. Newman Lumber Company v. Pace, 137, Miss. 504.
Y. & M. V. R. R. Company v. Lawler, 130 Miss. 421.
Ponder v. Martin, 119 Miss. 156.
Burton v. Pepper, 116 Miss. 139.
Coe v. Armour Fertilizer Company, 237 U. S. 413.
Stuart v. Palmer, 74 N. Y. 183.
Paulsen v. Portland, 149 U. S. 38.
Bonslog v. City of Gulfport, 112 Miss. 184.
Dunn v. Love (dissenting opinion) 155 So. 335.

Appellants, therefore, respectfully submit that the cause should be reversed and the petition dismissed for the reason that the procedure followed and the law involved **(Chapter 251 of the Laws of the State of Mississippi, 1932)** deprived them of their property without due process of law in violation of **P. 1 of the 14th Amendment to the Constitution of the United States.**

Appellants further contend that **Chapter 251 of the Laws of the State of Mississippi, 1932,** and the judgment of the Court below denied them the equal protection of the law in violation of **P. 1 of the 14th Amendment to the Constitution of the United States.**

A reference to **Chapter 251 of the Laws of the State of Mississippi, 1932,** at once discloses that certain depositors and common creditors of the defunct bank in question, are denied equal protection of the laws under same. The statute provides that correspondent banks, although general creditors, are to be paid in full, while depositors, also general creditors, are to be paid in such manner as seventy-five

per cent of the depositors and creditors of such defunct banking institution, or depositors and creditors owning seventy-five per cent of the claims against said defunct banking institution, shall decide. This is clearly a discrimination based upon no classification whatever, whether reasonable or otherwise.

The decree and judgment of the Court below is in a similar situation. A reference to the decree in question shows that creditors holding cashier's checks were ordered paid in full, although mere general creditors, and depositors whose accounts were under $5.00 were ordered paid in full, although mere general creditors, while all non-assenting depositors, whose accounts exceeded $5.00, are compelled to accept a certain per cent of their claim, part in cash and the balance in installments.

It appears to us that this denies to appellants the equal protection of the law, in violation of **P: 1 of the 14th Amendment to the Constitution of the United States.** It is well settled that equal protection of the laws requires equal operation of the laws upon all persons in like circumstances, and this requirement may be abridged by expressed statutory enactment or by improper execution through duly constituted agents, and where classification is attempted to justify a seeming discrimination, such classification must be reasonable and bear a just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

Maxwell v. Bugbee, 250 U. S. 525.

Buchanan v. Marley, 245 U. S. 60.
Sunday Lake Iron Company v. Wakefield, 247 U. S. 350.
Royster Guano Company v. Virginia, 253 U. S. 412.
G. C. & S. F. R. R. Company v. Ellis, 165 U. S. 150.

It is clear, therefore, that these appellants were denied the equal protection of the laws, both under the statute itself and the decree and judgment of the Courts below. The common depositors and the common creditors are compelled by statute to accept whatever either three-fourths of the number of creditors agree for them to accept, or, in the alternative, whatever a lesser number having three-fourths of the credits involved, determine is best for them to take; whereas, the correspondent bank, although a simple creditor, and having a simple demand, not secured by collateral or pledges, is not compelled to accept such settlement.

The terms must be acceptable to such banks and they may prevent, at their will, a scheme from becoming effectual until they have been paid in full, as seems to have been done in the present case. By the very terms of the act itself, it is not to apply to all persons in the same situation, but as to public depositors, or those depositors and creditors holding preferred claims or secured claims, or correspondent banks, although holding no preferred claims and no securities, the act shall not apply at all.

It favors a bank which is a common creditor, having checks and other obligations or collections with the bank, when it closes, guaranteeing to it favors at the expense of

all others. To say the least, such question is a substantial, material, and real federal question, viewed in the light of the record before this Court.

It seems to us that the violation of the constitutional provisions as set out above, on the facts as they exist in this case, is too clear for doubt and appellants respectfully submit that the case should be reversed and the case dismissed, in that, the act itself **(Chapter 251 of the Laws of the State of Mississippi, 1932)**, and especially as applied in this case deny to these appellants the equal protection of the laws in violation of **P. 1 of the 14th Amendment to the Constitution of the United States.**

At the request of appellants the petitioners were requested to give an appraisal of the real estate, loans and discounts and other assets belonging to the bank in liquidation and the reply to that demand is shown by the record, pages 65, 66, and 67.

On page 66 of the record the following statement is made as to the appraisals of loans and discounts:

"It is impossible on so short a notice to give an itemized appraisal of all loans and discounts and other assets of the Peoples Bank and Trust Company in liquidation, but the valuation of these various items of assets in the Exhibit 5 to the reopening Petition are very conservative."

Pages 133 to 166 inclusive recited a list of notes, description of real and personal property and other assets but give no valuation thereof other than the values at

which they were carried on the books of the defunct bank.

It will be noticed from this list that the real estate is in many counties of the state.

The Superintendent of Banks and liquidating agent had been in possession and had control of these assets for more than two years and if they were unable to give an appraisal thereof it is manifest that the creditors could not. And the Court was in no position and had no adequate data upon which to base its findings.

As said in **National Surety Company vs. Coreill, 289 United States 462, 77 L. Ed. 1300:**

"The non-assenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based upon adequate data.

"For the proper disposition of these questions definite, detailed and authentic information was essential. * * *

"There was no valuation of the assets by a disinterested appraiser. * * *

"Every important determination by the Court in receivership proceedings calls for an informed independent judgment. In the case at bar special reasons existed why the Court should have secured adequate, trustworthy information. The proceeding was not an adversary one; and jurisdiction rested wholly upon the consent of the different corporations."

It appears to us that the proceedings in the case at bar are in direct conflict with the requirements announced

by this Court in the Coreill Case supra.

There are other similarities between the case at bar and the Coreill Case which we will not attempt to specifically call the Court's attention to herein.

CONCLUSION

Appellants reiterate former contentions that this Court should reverse this case and dismiss the petition for the reason that the application of the statute involved, the judgment of the Supreme Court of the State of Mississippi and the procedure followed respectively violate **Section 10 and the 14th Amendment of the Federal Constitution** as heretofore pointed out.

Appellees will probably cite the Minnesota Moratorium Case **(Home Building and Loan Association vs. Blaisdell, Supreme Court Reporter, Volumn 54, No. 5 page 231).** A close analysis discloses at once the difference between it and the instant case. The remedy in the Blaisdell Case was not impaired or destroyed. The creditor in that case retained his remedy and all the rights of the creditor were preserved. The creditor was only postponed in the enforcement of his remedy being the recipient of a reasonable consideration from the debtor by virtue of the postponement.

Counsel for appellee will probably cite the Kentucky case of **Milner et al vs. Gibson et al, 61 S. W. (2 d.) 273.** A close analysis of this case shows at once a dis-

tinction between it and the case at bar. In the Milner case all remedies and rights of the depositors were preserved. It is true that the depositors were held to be bound by the reopening statute, but it is also true that the bank as reopened became liable to the depositors for the full amount of the claims and the depositors were further entitled to enforce their claims against the bank and the stockholders liability for payment of these claims, and the payment of all depositors in full where ordered and fixed at a definite and specified time. It is seen that neither the rights of the depositors in that case nor the remedies open to them for the enforcement of their rights were either impaired or destroyed.

It does not take a technician to note the difference between these cases and the case at bar. A mere reading of the record shows that all remedies open to these appellants and the enforcement of their claims were impaired and destroyed by the insolvent banking institution. Its stockholders, its officers and directors, were absolutely released of any further liability to them for the payment of said claims with the exception of twenty-five per cent of the original amount of their claims, if, and when collected. Thus it is clearly seen that there is involved in this case destruction of remedies, annihilation of contractual obligations and the destruction of vested rights.

Counsel for appellee will probably further argue that a complete answer to the contention of appellants is the reserved power of the State commonly known as the police power. However, this Court has answered such contention adversely.

In the case of Gunn v. Barry, 15 Wallace 610, this Court said, in holding void a state statute which so enlarged exemptions as to deprive an antecedent judgment creditor, of his judgment lien:

"No one can cast his eyes over the former and latter exemptions without being struck by the greatly increased magnitude of the latter. The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair; it annihilates the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and this destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact. The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them: provided the change involves no impairment of a substantial right. If the provision of the Constitution or the legislative act of a state, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The jurisdictional prohibition which they contain with respect to the courts of the state, can, therefore, form no impediment to the plaintiff in error in the enforcement of his rights touching this judgment, as those rights are recognized by this Court."

This Court has further held in the case of **Terry vs. Anderson, 5 Otto 628:** "In all cases of alteration of remedies, the question is one of reasonableness."

In the case of **Memphis vs. United States, 7 Otto 293,** this Court has established the rule that a creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and the Legislature of a state cannot take them away without impairing the obligation of contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided. The law is, in effect, a part of the contract.

As said in **Six Ruling Case Law 195:**

"While there are no precise limits to the police power, it is not, however, without its limitations, since it may not unreasonably invade private rights or violate the rights which are guaranteed under either Federal or State Constitutions."

In **Phipps vs. Chicago, 171 N. E. 289** the Court said:

"The Legislature may not, under the guise of protecting the people's interest arbitrarily interfere with private rights. An act which deprives a citizen of his liberty or property cannot be sustained under the police power unless due regard for the public welfare, health, comfort, and safety requires it."

In the present case the only testimony in regard to

the public welfare introduced is shown in record page 89 in the testimony of the liquidating agent as follows: "The reopening of the bank, I do not think would have anything to do with the general conditions of the country, but I think it would have a marked effect on the local condition. It is generally recognized that a debtor to a closed or a bankrupt institution, does not have near the regard for its obligations as if he owes it to an open and going institution."

Certainly this does not justify the invoking of the police power as a justification for the decree rendered in this cause. We are unaware of any decision of this Court, or any other Court, permitting the police power to be invoked against a citizen with reference to contract rights. Practically all the decisions of which we are aware involve the police power with reference to the regulations of corporation and not to the rights and vested interests of private citizens.

Appellants, therefore, respectfully submit that **Chapter 251 of the Laws of the State of Mississippi, 1932**, the decree of the Chancery Court of Lee County, Mississippi, and the judgment of the Supreme Court of the State of Mississippi violate **P. 1 of Section 10 of the Constitution of the United States** as heretofore set forth and for such reasons appellants respectfully submit that the cause should be reversed and the petition dismissed.

Respectfully submitted,

E. C. SHARP,

GEO. T. & CHAS. S. MITCHELL

I, Chas. S. Mitchell, of counsel for appellants hereby certify that I have this day delivered to C. R. Bolton a true and exact copy of this brief and have mailed to Creekmore & Creekmore and Flowers, Brown and Hester, of counsel for appellees, Jackson, Mississippi, copies of this brief.

This the 2nd day of March, 1935.

CHAS. S. MITCHELL.

EXHIBIT "A"

STATE OF MISSISSIPPI
HINDS COUNTY

Personally appeared before me, the undersigned authority authorized to administer oaths, Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, who makes affidavit that on the 12th day of December, 1934, he sent by registered airmail, return receipt requested, the transcript of record in the case of **Mrs. Birdie Lowry Dunn, et al, vs. J. S. Love, Superintendent of Banks,** which said cause was appealed from the Supreme Court of the State of Mississippi to the Supreme Court of the United States. That said record was addressed to the Clerk of the Supreme Court of the United States, and affiant herewith attaches to this affidavit return receipt for said transcript, signed "C. E. Cropley, by W. C. Syphax," showing delivery of said transcript on the 13th day of December, 1934, and attaches hereto a letter dated December 13, 1934, signed "Charles Elmore Cropley, Clerk, by E. P. Culliman, Assistant," acknowledging receipt of said transcript.

This affidavit is furnished at the request of attorneys for appellant in the above styled cause, to be used to refute the motion to dismiss filed in said cause showing that said record was not filed within 40 days, or before the 15th day of December, 1934.

TOM Q. ELLIS,
Clerk of the Supreme Court

of the State of Mississippi.

Sworn to and subscribed before me, this the 25th day of February, 1935.

(SEAL) WALKER WOOD,

Secretary of State of Mississippi.

EXHIBIT "B"

Penalty for private use to avoid payment of postage, $300
Postmark of delivering office. Mail early for Christmas.
Cancellation Stamp—Washington, D. C., Dec. 13, 1934

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

REGISTERED ARTICLE NO. 6798 Insured Parcel No.----------

Return to Tom Q. Ellis, Clerk. (Name of sender).
Street and number, or Post Office Box:
Supreme Court of Miss.
Post Office at Jackson, Mississippi.
Rev. 3-24 c5—6116 State----------:

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

C. E. CROPLEY (Signature or name of addressee)
W. C. SYPHAX (Signature of addressee's agent)
Date of delivery Dec. 13, 1934
Form 3811 U. S. Government Printing Office c5—6116

EXHIBIT "C"

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

December 13, 1934.

Tom Q. Ellis, Esq.,
Jackson, Miss.
Dear Sir:

I have your letter of the 12th instant, enclosing transcript of record in the case of **Mrs. Birdie Lowery Dunn, et. al. v. J. S. Love, Superintendent etc.** It would be greatly appreciated by this office if in forwarding records you would in some way bind the pages together.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk.
By E. P. CULLIMAN, Assistant.

EPC-W.